State of Washington
GROWTH MANAGEMENT HEARINGS BOARD
FOR EASTERN WASHINGTON

FUTUREWISE, Petitioner, v. PEND OREILLE COUNTY, Respondent.	Case No. 05-1-0011 FINAL DECISION AND ORDER

I. SYNOPSIS

On October 17, 2005, Pend Oreille County adopted its first Comprehensive Plan and Future Land Use Map under Resolution No. 2005-33. This document describes the County's land use element, which encompasses the GMA requirements, land use goals and policies, land use existing conditions, future land use, and critical areas. The County adopted a variety of rural densities in the Comprehensive Plan, including Rural-2.5, a one dwelling unit per 2.5 acres.

The Petitioner, Futurewise, filed a timely petition for review with the Eastern Washington Growth Management Hearings Board (Board) asking for a review of the Rural-2.5 land use designation. The Petitioner claims Pend Oreille County Resolution No. 2005-33 violates the GMA for four reasons: the County's Comprehensive Plan designates part of the rural area for urban growth; the Plan will create sprawling, low density development that will affect natural resources and conflict with adjacent agricultural, forest, and mineral resource lands; the Plan will violate two of the GMA planning goals, 1 and 2; and the County failed to provide a written record that explains how the Rural-2.5 designation harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of the GMA.

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The Board finds for the most part that Pend Oreille County has done a thorough and thoughtful job on its first Comprehensive Plan. However, the Board finds the Petitioner has carried their burden of proof in Issue No. 1, regarding the County's adoption of its Rural-2.5 designation. This low-density rural designation fails to comply with RCW 36.70A.020(1), RCW 36.70A.020(2) and RCW 36.70A.070(5), creating an urban-like density in the rural areas. The Growth Boards have repeatedly opined that rural densities of less than one dwelling unit per 5 acres creates sprawling, low-density development, fails to protect water quality and quantity, and fails to protect the natural resource environment.

The action of the County is clearly erroneous in light of the entire record. Pend Oreille County is found out of compliance with the GMA.

II. PROCEDURAL HISTORY

On December 14, 2005, FUTUREWISE, by and through its representative, John Zilavy, filed a Petition for Review.

On January 18, 2006, the Board held a telephonic Prehearing conference. Present were, Judy Wall, Presiding Officer, and Board Members Dennis Dellwo and John Roskelley. Present for Petitioners was John Zilavy. Present for Respondent was Thomas Metzger.

On January 18, 2006, the Board issued its Prehearing Order.

On April 6, 2006, the Board received a Joint Motion for Extension of Case Schedule signed by the parties requesting a ninety (90) day extension. The parties are currently pursuing settlement discussions. The Board is asked by the parties to grant a ninety (90) day extension.

On April 7, 2006, the Board issued an Order of Extension.

On July 6, 2006, the Board received a Joint Motion for Extension of Case Schedule signed by the parties requesting a thirty (30) day extension. The parties are currently pursuing settlement discussions. The Board is asked by the parties to grant a thirty (30) day extension.

On July 14, 206, the Board issued its Order on Extension.

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On July 28, 2006, the Board received a Joint Motion for Extension of Case Schedule signed by the parties requesting a thirty (30) day extension. The parties are currently pursuing settlement discussions. The Board is asked by the parties to grant a thirty (30) day extension.

On July 31, 2006, the Board issued an Order of Extension.

On October 4, 2006, the Board held the Hearing on the Merits. Present were, acting Presiding Officer, John Roskelley and Board Member Dennis Dellwo. Presiding Officer, Judy Wall was unavailable. Present for Petitioner was Alexandria Doolittle. Present for Respondent was Tom Metzger and Michael Kenyon.

III. PRESUMPTION OF VALIDITY, BURDEN OF PROOF AND STANDARD OF REVIEW

Comprehensive plans and development regulations (and amendments thereto) adopted pursuant to Growth Management Act ("GMA" or "Act") are presumed valid upon adoption by the local government. RCW 36.70A.320. The burden is on the Petitioners to demonstrate that any action taken by the respondent jurisdiction is not in compliance with the Act.

The Hearings Board will grant deference to counties and cities in how they plan under Growth Management Act (GMA). RCW 36.70A.3201. But, as the Court has stated, "local discretion is bounded, however, by the goals and requirements of the GMA." *King County v. Central Puget Sound Growth Management Hearings Board,* 142 Wn.2d 543, 561, 14 P.2d 133 (2000). It has been further recognized that "[c]onsistent with *King County,* and notwithstanding the 'deference' language of RCW 36.70A.3201, the Board acts properly when it foregoes deference to a . . . plan that is not 'consistent with the requirements and goals of the GMA." *Thurston County v. Cooper Point Association,* 108 Wn. App. 429, 444, 31 P.3d 28 (2001).

Pursuant to RCW 36.70A.320(3) we "shall find compliance unless [we] determine that the action by [Jefferson County] is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of [the GMA]." In order to find the

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County's action clearly erroneous, we must be "left with the firm and definite conviction that a mistake has been made." *Department of Ecology v. Public Utility Dist. 1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

The Hearings Board has jurisdiction over the subject matter of the Petition for Review. RCW 36.70A.280(1)(a).

IV. ISSUES AND DISCUSSION

Issue No. 1:

Does adoption of Resolution No. 2005-33, adopting a Comprehensive Plan and Future Land Use Map that allow rural development at one unit per 2.5 acres, fail to comply with RCW 36.70A.020(1), RCW 36.70A.020(2) and RCW 36.70A.070(5) when the allowed densities fail to protect rural character, are urban in nature and otherwise fail to comply with the GMA?

The Parties' Position:

Petitioner:

The Petitioner, Futurewise, segments Issue No. 1 into five separate arguments, listed as A. through E., which in their opinion explain why the Rural-2.5 designation in the Pend Oreille County Comprehensive Plan fails to comply with the GMA.

In **A. The Rural-2.5 comprehensive Plan designation designates rural land for urban growth in violation of the Growth Management Act (GMA)**, the Petitioner argues that "The Legislature adopted the Growth Management Act (GMA) to control sprawl…". *King Co. v. CPSGMHB*, 138 Wn. 2d 161, 166-67, 979 P.2d 374, 377 (1999). One of the most important tools to prevent sprawl is RCW 36.70A.070(5), which guides rural development in counties.

The Petitioner contends that the three Growth Boards have held that rural densities may be no greater than one dwelling unit per five acres and cites *City of Moses lake v. Grant Co*, EWGMHB Case No. 99-1-0016 FDO, pp. 3-4 (May 23, 2000). The Petitioner also cites *Diehl v. Mason County*, where the Court of Appeals held that residential densities of one housing unit or more per 2.5 acres are prohibited in rural areas. *Diehl v. Mason Co.*, 94

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Wn. App. 645, 655-57, 972 P.2d 543, 547-49 (1999). Urban growth, as defined by RCW 36.70A.030(18), is prohibited in the rural areas.

According to the Petitioner, Pend Oreille County recognizes that densities of one dwelling unit per 2.5 acres are incompatible with natural resource lands. Rural densities have to be consistent with rural uses, rural development and natural resource lands. The Pend Oreille County Comprehensive Plan shows densities of one dwelling unit per 2.5 acres are not compatible with natural resource lands.

The Petitioner requests that the Board take official notice of a U.S. Department of Agriculture National Agricultural Statistics Service publication concerning the 2002 census of agriculture in Washington State. This publication details the size of the farms in Pend Oreille County. The average size farm was calculated at 233 acres. The smallest category of farm ranged from one to nine acres in size and there were only eleven farms that size with an average of 6.2 acres. This data supports the Growth Boards' holdings on rural densities. Densities of one dwelling unit per 2.5 acres are incompatible with the primary use of land designated pursuant to RCW 36.70A.170. The Rural-2.5 Comprehensive Plan designation violates RCW 36.70.070(5), which prohibits designating land for urban growth in the rural element and requires appropriate rural densities and uses that are not characterized by urban growth.

Pend Oreille County, according to the Petitioner, has designated over 14,000 acres as Rural-2.5. If divided into 2.5 acre lots, this land would result in 5,600 new residential lots in the rural areas. This urban growth, along with 27,000 acres in "rural settlement areas, crossroad commercial centers, and highway commercial areas" and 17,000 acres of current "suburban enclaves" would add far too much urban area to the County. Petitioner's HOM Brief at 11-12.

The Petitioner also recognizes that *Woodmansee, et al. v. Ferry County* allowed 2.5 acre lots in the rural area and argues that in that case the opinion was decided by this Board in 1996, two years before the Court of Appeals' *Diehl* decision. *Woodmansee, et al. v. Ferry Co.*, EWGMHB Case No. 95-1-0010 FDO, p. 5 (May 13, 1996). The *Diehl* decision is

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binding on the Growth Board, which can no longer find that densities of one dwelling unit per 2.5 acres complies with the GMA. In addition, one dwelling unit per 2.5 acres is inconsistent with Pend Oreille County's local circumstances, unlike that of Ferry County's, which were "circumstances unique to Ferry County..." Ibid.

In **B. The Rural-2.5 comprehensive plan designation is not applied to limited areas of more intense rural development (LAMIRDs)**, the Petitioner argues that the Pend Oreille County Comprehensive Plan Rural Land Use Policy #10 shows that the County has not designated any LAMIRDs, but may do so in the future. So the Rural-2.5 designation is not applied to land within LAMIRDs and therefore these high rural densities are not LAMIRD densities that might otherwise be allowed under RCW 36.70A.070(5)(d).

In **C. The Rural-2.5 comprehensive plan designation does not protect rural character, resource lands, and water quantity**, the Petitioner argues that Pend Oreille County's Rural-2.5 designation leads to the continued conversion of undeveloped land into sprawling, low density development, which violates RCW 36.70A.070(5)(c)(i) & (ii). The Petitioner substantiates their conclusion with several studies, including *Rural Sprawl: Problems in Eight Rural Counties*, by Reeder, Brown and McReynolds; and *What to Do About Rural Sprawl*, by Tom Daniels. Both studies detail the problems with small rural densities and rural/urban interface. Pend Oreille County has a rural lot inventory 2.8 times needed to accommodate 75 percent of the County's growth target, and twice that needed to accommodate the entire growth target. Thus, bringing more people into the rural areas using the Rural-2.5 designation does not protect adjacent and nearby resource lands as required by the GMA.

According to the Petitioner, the Pend Oreille County Comprehensive Plan's density of one dwelling unit per 2.5 acres does not meet the standards of RCW 36.70A.030(15), which were apparently adopted by the County. This density will not foster "traditional rural lifestyles, rural-based economics, and opportunities to both live and work in the rural areas." RCW 36.70A.030(15)(b). In addition, the Rural-2.5 designation will not reduce the

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inappropriate conversion of undeveloped land into sprawling, low-density development (RCW 36.70A.030(15)(e), nor protect natural surface water flows (RCW 36.70A.030(15)(g).

In **D. The Rural-2.5 comprehensive plan designation does not encourage development in urban areas or reduce the inappropriate conversions of undeveloped land into sprawling, low-density development in violation of the GMA Goals**, the Petitioner argues that the Rural-2.5 Comprehensive Plan designation does not comply with GMA Goal Nos. 1 and 2. Pend Oreille County has over twice as many lots as needed to accommodate the County's entire growth target. Allowing small rural lots at 2.5 acres per dwelling unit will not encourage development in urban areas.

Pend Oreille County currently has an average density of one home per 2.75 acres. Rather than trying to address the large number of high density lots in the rural area, the Rural-2.5 designation will allow more, even smaller lots. This does not fulfill the requirements of Goal No. 2, to "reduce the inappropriate conversion of undeveloped land into sprawling, low-density development." RCW 36.70A.020(2).

In **E. The County has not prepared a written record that explains how the Rural Element, especially the Rural-2.5 designation, harmonizes the planning goals in RCW 36.70A.020 and meets the requirement of the GMA**, the Petitioner argues that Pend Oreille County has not established a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of the GMA under RCW 36.70A.070(5)(a). The Petitioner cites *Citizens for Good Governance, et al. v. Walla Walla County*, EWGMHB Case Nos. 01-1-0015c and 01-1-0014c, 2002 WL 32965594, p. 4-5 (May 1, 2002) as an example of the Board's requirement for a written record as to how a county's rural element so designed, harmonizes the planning goals.

Respondent:

The Respondent has "lettered" the five portions addressed by the Petitioner in Issue No. 1 beginning with B.

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In **B. (Petitioner's A.)**, the Respondent contends the County's Comprehensive Plan has a variety of rural densities and uses expressly authorized by the GMA. The County argues it has followed RCW 36.70A.040(4)(d) and RCW 36.70A.070(5) and utilized "innovative techniques." The GMA does not specify particular densities as urban or rural, rather the GMA correctly leaves this determination to the sound discretion of local elected officials and appointed planning commissions. RCW 36.70A.070(5)(b).

Contrary to the Petitioner's argument that rural density outside of a LAMIRD may not be more intense than one dwelling per five acres, the Respondent contends the Washington State Supreme Court says otherwise. In *Viking Properties v. Holm*, 155 Wn2d at 129, the Court made it clear that the GMA does not impose any "bright line" minimum density. Imposition of a "bright line" test was tantamount to establishing state-wide policy, which is outside the Board's authority. In addition, the Court made it clear that a "bright line" argument fails to account for the fact that the GMA creates a general framework to guide local jurisdictions, not "bright line" rules.

The Respondent cites *Citizens for Good Governance, et al. v. Walla Walla County,* EWGMHB Case No. 05-1-0013, as an example where the Eastern Board allowed local government broad discretion in developing comprehensive plans and development regulations tailored to local circumstances. The Board in that case allowed a "three units per acre density" factor, rather than the four dwelling units per acre that is recommended for urban areas. *Citizens for Good Governance, et al. v. Walla Walla,* EWGMHB Case No. 05-1-0013, FDO (June 15, 2006).

The Respondent further contends that the Petitioner offers no evidence that the Rural-2.5 designation is in any manner "incompatible" with the primary use of land for "rural uses" or "natural resources". RCW 36.70A.170. According to the Respondent, none of the agencies or companies charged with managing natural resource lands in Pend Oreille County argued that the County's plan would interfere with their ability to maintain productive forest lands.

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The Respondent also argues that the Petitioner's ignore the terms of the GMA, which authorize a "variety of residential densities." RCW 36.70A.030(16) and RCW 36.70A.070(5)(b). The Petitioner must prove that the Rural-2.5 designation is both incompatible with natural resource lands and this designation isn't within the meaning of a "variety of residential uses." The Respondent argues that the Petitioner's proof, the U.S. Census of Agriculture 2002 document, is irrelevant. Pend Oreille is a timber county, not farmland. Agricultural Open Space designation totals only three percent of the land area in the County.

In regards to the Petitioner's allegation that the Rural-2.5 designation is scattered throughout the unincorporated part of the County, the Respondent argues the Rural-2.5 designation is focused near lakes and along the Pend Oreille River. These areas are in the populated southern part of the County.

The Respondent's argument cites *Viking Properties* again to refute the Petitioner's reliance on *Diehl v. Mason Co*, 94 Wn. App. 645, 656, 972 P.2d 543 (1999). The Respondents contend in *Diehl* that the county's comprehensive plan provided density levels for each of its rural and urban growth areas, allowing essentially the same density level and maximum residential density level. The Board found the rural designations did not comply with the rural growth requirements of the GMA. The Court simply held that the Board's decision was supported by the record, not as the Petitioner states that "[r]esidential densities of one housing unit, or more, per 2.5 acres are prohibited in rural areas." Respondent's HOM Brief at 15.

The Respondent ends this section by arguing that the Rural-2.5 designation is found throughout counties in Washington. According to one survey, 40% of Washington counties provided for density at or greater than one dwelling unit per two and a half acres.

In **C. (Petitioner's B)**, the Respondent contends that there is no GMA requirement to limit the Rural-2.5 designation solely to LAMIRDs. The Respondent details the County Comprehensive Plan's process to monitor and evaluate requests for more intensive use. The County planned for potential LAMIRDs and sub-area plans. In light of *Viking Properties*, the

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fact that the County may consider LAMIRDs in the future is not evidence that the Rural-2.5 designation is clearly erroneous.

In **D. (Petitioner's C)**, the Respondent argues that the Rural-2.5 designation does protect rural character, resource lands and water quality. The Respondent contends that rural development can consist of a variety of uses and residential densities and cites RCW 36.70A.030(15). According to the Respondent, the Petitioner relies on their own conclusions and two reports it submitted into the County's record, one by Reeder and another by Daniels. The Respondent contends neither is an objective report, nor do they represent the conditions in Pend Oreille County. The Respondent argues that only two percent of the County is designated Rural-2.5 and is further constrained or developed. Constraints include critical areas, locations such as within a fire district and within five miles of a fire station, or located along highways, state routes or other arterials.

The Respondent further contends that the Petitioner states its own conclusions without corresponding citation to support the record. The County's rural element permits rural development; it is located outside of the UGA's and outside of designated resource lands and provides for a variety of residential densities and uses; those densities constitute defined rural character.

In **E. (Petitioner's D.)**, the Respondent contends the County considered and was guided by the GMA planning goals in adopting the Rural-2.5 designation. The Respondent argues that the County is given a "broad range of discretion that may be exercised by counties and cities consistent with the requirements... and goals of [the GMA]. RCW 36.70A.3201. The Legislature has specified that there is no single approach and local governments have the flexibility to accommodate local needs.

The Respondent argues that the GMA requires counties and cities to plan continuously for future growth. The fact that the rural densities provided in Pend Oreille County's Plan authorize more development than is necessary to satisfy population projections cannot violate GMA planning goal. The Respondent contends that the Petitioner has not carried their burden of proof to identify that portion of the challenged enactment

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that is not consistent with the planning goal. No legal authority has been offered by the Petitioner.

In **F. (Petitiioner's E.),** the Respondent contends the County was not required to prepare a specific "written record" pursuant to RCW 36.70A.070(5)(a) because the County did not undertake a specific review of local circumstances. The County could not have adopted its Comprehensive Plan without consideration of the circumstances within the County. Each comprehensive plan is unique to that county.

The Legislature provided that counties and cities may consider local circumstances, but shall develop a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of the GMA. Here, the Respondent helps define "may" and "shall" and cites a number of cases. They conclude that the GMA entitles, but does not require, a county to undertake a heightened level of review and consideration of local circumstances in establishing rural densities and uses. The Respondents contend the County did not take a heightened review in this case, so do not have to provide an explanatory "written record" as required by RCW 36.70A.030(15) and RCW 36.70A.070. The Respondent contends that in order for the Board to adopt the Petitioner's argument in this issue, the Board would have to rule that the definition of "may" does not mean "may" and that, according to the Respondent, is absurd.

Petitioners Reply Brief:

The Petitioner contends the County has adopted a Rural-2.5 designation that provides for urban densities in rural areas and this is a recipe for low-density sprawl, which is prohibited in the creation of a rural element.

The Petitioner's first argument with the Respondent's brief concerns the County's analysis of *Viking Properties v. Holm*, 155 Wn.2d 112, 118 P.3d 322 (2005). The Petitioner contends their analysis is wrong because *Viking Properties* is a case of restrictive covenants and public policy, and is not controlling in this case. *Diehl v. Mason Co*. is the controlling case. The Petitioner argues that *Viking Properties* in no way limits this Board's ability to interpret those portions of the GMA applicable to the issues in this case, or in applying

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Diehl. According to the Petitioner, *Diehl v. Mason Co.*, 94 Wn. App. 645, 972 P.2d 543 (1999) was not overturned by *Viking Properties*.

The Petitioner also argues that the Growth Boards have shown a pattern in these decisions and find that five-acre lots are generally considered the minimum lot size in the rural-agricultural areas and only when a variety of larger lot sizes are available, while 2.5-acre lot sizes are more urban and promote sprawl. The Petitioner cites several Grant County cases where the Board has concluded that 2.5-acre lots are classic low-density sprawl. The Petitioner contends that with 4,000 unimproved lots in the rural areas of the County totaling almost 11,000 acres, the density would average out to one dwelling unit per 2.75 acres. Further calculations show that the existing lots in the rural area have over twice the capacity needed to accommodate the County's 2025 growth target. This is not a planning method that will promote growth in the designated urban growth areas.

The Petitioner argues that the Reeder and Daniels articles are scientific and scholarly research. Furthermore, the Washington State Department of Community, Trade and Economic Development (CTED) recommends rural residential densities of one housing unit per five and ten acres. This is a reputable source of information.

According to the Petitioner, the County did not comply with the mandatory requirements of RCW 36.70A.070(5)(c). The five measures (i. through v.) that apply to rural development and protect the rural character are listed and the Petitioner then proceeds to document the several ways in which the County failed to follow the statute.

Under measure i., the County's Rural Land Use Policy #10 proves that no LAMIRDs have been established in this plan.

Under ii., the Petitioner contends that developing at densities of one dwelling unit per 2.5 acres will spoil the visual compatibility of traveling through a rural farming and timber community.

Under iii., the Petitioner argues that such a low density in the rural areas will convert undeveloped land into sprawling, low-density development and factors the same numbers of acres and lots as before.

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Under iv., the Petitioner contends the County Planning Commission acknowledged there could be potential adverse effects from septic systems over the aquifers in Pend Oreille County, particularly in the Diamond Lake and Sacheen watersheds. The greater impact on water quality, and the sprawling effects that occur when densities of more than one dwelling unit per five acres occurs, is one of the major reasons why planning is required under GMA. The Petitioner suggests that if the Diamond Lake area is so unique in density it could be designated as a LAMIRD, rather than given a density of one dwelling unit per 2.5 acres.

Under v., the Petitioner contends that Pend Oreille County has not adequately protected the 86,000 acres of agricultural lands. The Rural-2.5 density will have adverse effects on farming and forestry. The Petitioner also clarifies the County's argument that 40% of the counties in Washington provide for densities at or greater than 2.5 acres per dwelling unit. According to the Petitioner, out of 32 counties included in the County's data, 24 allow for these densities only for existing development. The statistics are misrepresented.

The Petitioner also contends that the mandatory requirements of the Rural Element were not complied with. For instance, the County argues that under *Viking* the Rural-2.5 designation is valid because it provides for a variety of densities. The Petitioner argues that the GMA does mandate a variety of rural densities, which is different. The County's Rural-2.5 is an urban density. The variety of rural densities must be consistent with the definition of Rural Character as defined in RCW 36.70A.030(15), which was covered in the Petitioner's HOM brief. Further, the Petitioner contends they have shown that the County's Rural-2.5 designation meets the definition of urban growth.

The Petitioner ends by arguing that the County has opted into being required by RCW 36.70A.070(5)(a) to create a written record. The County has admitted that it did base its decision on local circumstances. Therefore they have opted into being required by that statute to provide a written record, so the County's argument fails.

Board Analysis:

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The Board looks to the statutes, case law and record to determine if Pend Oreille County's Rural-2.5 designation is in violation of the GMA.

RCW 36.70A.020 Planning Goals, guide the development and adoption of comprehensive plans and development regulations of those counties and cities that are required or choose to plan under RCW 36.70A.040. Pend Oreille County chose to plan under the GMA and formalized this decision by adopting Resolution No. 90-113 on December 28, 1990. Fifteen years later, on October 17, 2005, the County adopted the Pend Oreille County Comprehensive Plan under Resolution No. 2005-33.

RCW 36.70A.020(1) relates to urban growth. The GMA wants counties and cities to "[E]ncourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner." The second GMA goal, RCW 36.70A.020(2), requests counties and cities to reduce sprawl: "Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development."

The Petitioner contends that the adoption of the Rural-2.5 designation in the Pend Oreille Comprehensive Plan violates the GMA and allows low-density sprawl in the rural areas. The Petitioner cites RCW 36.70.070(5)(a) and (c) to show that the County did not follow the requirements in establishing a rural element and instead allowed 2.5 acre lots in the rural area. The Petitioner claims the following:

A. The County's Comprehensive Plan designates rural land for urban growth.

B. The Rural-2.5 designation is not applied to LAMIRDs.

C. The Rural-2.5 designation does not protect rural character, resource lands and water quantity.

D. The Rural-2.5 designation does not encourage urban growth in urban areas or reduce the inappropriate conversions of undeveloped land into sprawling, low-density development.

E. The County has not prepared a written record that explains how the Rural-2.5 harmonizes the GMA planning goals.

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RCW 36.70A.070(5)(a) allows counties to establish patterns of rural densities and uses and may consider local circumstances. Pend Oreille County's Comprehensive Plan shows a variety of rural densities, including the Rural-2.5 and the County justifies its decision to adopt the smaller 2.5 acre lots due to local circumstances. The Rural-2.5 density is generally considered urban in nature, not rural. If the County chooses to use local circumstances to justify smaller density lots, the statute requires the County to provide a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirement of RCW 36.70A. The County has not done this.

One statute that needs mentioning is RCW 36.70A.011 **Rural lands**. This chapter is intended to recognize the importance of rural lands and rural character to Washington's economy, its people, and its environment, while respecting regional differences. In part, this "Rural lands" chapter also finds that in "...defining its rural element under RCW 36.70A.070(5), a county should foster land use patterns and develop a local vision of rural character that will: ...be compatible with the use of the land by wildlife and for fish and wildlife habitat; foster the private stewardship of the land and preservation of open space; and enhance the rural sense of community and quality of life." The County's Rural-2.5 density fails to develop this "local vision of rural character."

The Petitioner contends that the County's Comprehensive Plan designates rural land for urban growth, promotes sprawl and fails to protect natural resource areas and water quantity. There are numerous Growth Management Hearings Boards decisions addressing rural lot size to prevent urban growth in rural areas, prevent sprawl and loss of natural resource land.

But first there was some discussion in the Respondent's brief as to the Board's jurisdiction in this matter. In 2002, the Eastern Board addressed the assertion by Grant County that the GMA gives counties the authority to determine appropriate lot sizes in the rural areas:

> We disagree with the statement made by the County that "the GMA gives the County, ... the authority to determine appropriate lot sizes and uses in rural

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areas," if that statement means that the County believes there is no role for the GMA in that decision. The GMA does limit the amount of previously unbridled discretion of local governments to "determine appropriate lot sizes and uses in rural areas." This is because of RCW 36.70A.060, .070, .170, and .020(8). *City of Moses Lake v. Grant County,* EWGMHB, 99-1-0016, Order on Remand, (April 17, 2002).

This is not to say there is a "bright line" rule concerning rural lot sizes. Counties and cities do have some discretion based on local circumstances, but this discretion on rural lot sizes or density is limited by the GMA and must be justified in the record.

The Courts clarified some of its recent holdings regarding deference and the authority of the Boards. While the Legislature intends that the Board grant deference to counties and cities in how they plan for growth, consistent with the goals and requirements of the GMA, RCW 36.70A.3201, according to the courts, "the Board itself is entitled to deference in determining what the GMA requires. This court gives 'substantial weight' to the Board's interpretation of the GMA." *King County v. CPSGMHB*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000).

As to rural lot sizing, the Eastern Board in 2000, expressed concern about 5-acre lot sizes in rural areas and wrote:

> Generally, 5-acre lots in rural areas would be more difficult to justify, especially if a large number of such lots exist. Where the lot size is less than 10 acres in rural areas of a county, the Board must more carefully examine the number, location and configuration of those lots. It must determine whether such lots constitute urban growth; presents an undue threat to large-scale natural resource lands; thwarts the long-term flexibility to expand the UGA; or, will otherwise be inconsistent with the goals and requirements of the Act. *City of Moses Lake v. Grant County,* EWGMHB Case No. 99-1-0016, Final Decision and Order; (May 23, 2000).

Here the Board is recommending that lot sizes of less than ten acres in rural areas, even acreages as large as five acres, need to be scrutinized more carefully to determine whether they constitute urban growth, present future problems for agriculture or timber lands, or are inconsistent with the goals and requirements of the Act.

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In *Concerned Friends of Ferry County and David Robinson v. Ferry County*, EWGMHB Case No. 01-1-0019, the Eastern Board looked at numerous decisions by all the Boards and came to this conclusion:

> This Board notes a pattern in these decisions and others by the Growth Boards. Five-acre lots are generally considered the minimum lot size in the rural/agricultural areas and only when a variety of larger lot sizes are available, while 2.5-acre lot sizes are more urban and promote sprawl. The most important criterion for establishing minimum lot sizing in agricultural resource lands is establishing a process. How did the county or city establish the lot size, is there a variety of lot sizes available and is the process outlined in the record? *Concerned Friends of Ferry County and David Robinson, v. Ferry County,* EWGMHB, Case No. 01-1-0019, Third Order on Compliance, (June 14, 2006).

The above mentioned case also speaks to RCW 36.70A.070(5)(a), which requires a county to provide a written record or analysis to justify adopting urban sized lots in the rural areas.

Again, in *City of Moses Lake v. Grant County*, EWGMHB Case No. 99-1-0016, the Eastern Board addressed rural densities and, in particular, 2.5-acre lot sizes in the rural area:

> The GMA speaks of "a variety of rural densities". RCW 36.70A.070(5)(b). However, the density must still be rural, not urban. With one narrow exception, this Board has consistently found that anything under 5-acre lots is urban. Clearly 2.5-acre lots are the clearest vehicle of sprawl. Scattering these small lots around cities would continue what the GMA is trying to stop. Services cannot be easily provided; each will have their own well, septic tank and other limited infrastructure. This size lot is one of the most difficult to bring into a city if annexed. *City of Moses Lake v. Grant County,* EWGMHB, Case No. 99-1-0016, Order on Remand, (April 17, 2002).

The Western Board in *WEC v. Whatcom County,* WWGMHB Case No. 94-2-0009, felt that invalidity was justified when rural densities were more intense than one dwelling unit per three acres:

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> Invalidity was found for rural densities more intense than 1 dwelling unit per 3 acres and above under the record in this case. *WEC v. Whatcom County,* WWGMHB Case No. 94-2-0009 (Compliance Order, March 29, 1996).

The Central Board found that Pierce County, by failing to control the one unit per 2.5 acre density historically permitted, allowed a "perpetuation of the previously permitted sprawl pattern", but finally gained control with its adoption of a base density of one density unit per five acres. The Central Board wrote:

> It is undisputed that a significant portion of the Mid-county [rural] area is already platted and developed with lots that are 2.5 acres or less without urban services such as sewers. It is hard to think of a better example of low-density sprawl than the land use pattern reflected in this area. Much of this area was already platted and developed prior to the GMA. It is also undisputed that after the GMA was adopted the County's Plan designations and implementing zoning allowed residential development to occur in this area at 1 du/2.5 acres. . . .Had these designations been challenged at the time, it is highly likely that they would have been declared sprawl densities and remanded to the County to correct. . . . What the County has done [with the FLUM amendment] is to finally establish a base density of 1 du/5 acres – a rural density. What the establishment of this density does is end the perpetuation of the previously permitted sprawl pattern and protect what is left. It may not affect much land, and it is something that definitely could have been done earlier; nonetheless, now it is done with the effect of reducing continued low-density sprawl in the area. [*Bonney Lake, 05316c*, FDO, at 44.] *City of Bonney Lake, Jerome Taylor, The Buttes LLC and Futurewise v. Pierce County [Cities of Roy and Orting and Summit Waller Community Association – Intervenors]* CPSGMHB Consolidated Case No. 05-3-0016c, Order Finding Compliance [CPSGMHB Consolidated Case No. 04-3-0007c] and Final Decision and Order [CPSGMHB Consolidated Case No. 05-3-0016c], (Aug. 4, 2005).

This statement is particularly poignant for Pend Oreille County, which has had virtually no control over its land use and density until now. Pend Oreille County may not be growing at the rate of other counties, such as Pierce County, at the present time, but as acknowledged by staff and counsel at the Hearing on the Merits, Pend Oreille County land prices are accelerating and it has been "found" by people because of its natural resources,

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great beauty, numerous lakes and the Pend Oreille River. If the County doesn't get control of low-density sprawl and small lot development in the rural areas now, it will lose much of its attraction to potential residents and commercial development in the future.

Pend Oreille County has a rural lot inventory 2.8 times that needed to accommodate 75 percent of the County's growth target and twice that needed to accommodate the entire growth target. Thus, bringing more people into the rural areas using the Rural-2.5 designation does not protect adjacent and nearby resource lands as required by the GMA.

The Petitioner also argues that RCW 36.70A.070(c)(i-v), measures governing rural development, are mandatory and apply to rural development and protect the rural character of the area. The Board agrees. Land divisions of one density unit per 2.5 acres are generally considered urban in nature, as noted in the above case law. As such, these lots do not assure visual compatibility with the surrounding rural area; reduce the inappropriate conversion of undeveloped land in sprawling, low-density development; protect critical areas, surface water and ground water resources; nor protect against conflicts with the use of agriculture, forest and mineral resource lands. The County's plan would interfere with its ability to maintain productive forest lands, and protect rural character, resource lands and water quality.

The Petitioners also contend that the Rural-2.5 designation is not applied to limited areas of more intense rural development (LAMIRDs). RCW 36.70A.070(5)(d) explicitly allows for limited areas of more intensive rural development, including necessary public facilities and public services to serve the limited area. These areas are typically existing, or redevelopment, or new development of commercial, industrial, residential or mixed-use areas along shorelines, rural activity centers, villages, or crossroads developments. LAMIRDs are subject to specific requirements and logical boundaries. There are obvious areas in Pend Oreille County, such as Diamond Lake, where this land use designation would be appropriate.

The Boards have addressed LAMIRDs and urban-like densities in several cases. In *Smith v. Lewis County*, the Western Board stated:

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> Densities that are more intense that 1 du per 5 acres are not typically rural in character and exist in the rural environment, in the main, as part of LAMIRDs. *Smith v. Lewis County*, WWGMHB Case No. 98-2-0011 (Final Decision and Order, April 5, 1999).

The Central Board in *Burrow et al. v. Kitsap County,* decided that there isn't an explicit residential density in LAMIRDs because the density limit is unique to each:

> The Act's definitions (RCW 36.70A.030(17)) expressly state that development within LAMIRDs is not urban. The Act does not put an explicit limit on the absolute residential density permitted in LAMIRDs. The limit is unique to each LAMIRD and is established by the conditions that existed on July 1, 1990. [*Burrow, 9318,* FDO, at 19.] *Charlie Burrow, Linda Cazin and KCRP v. Kitsap County,* CPSGMHB Case No. 99-3-0018, Order on Compliance in a Portion of *Alpine* and Final Decision and Order in *Burrow*, (Mar. 29, 2000).

There is no requirement in the GMA for a county to designate a limited area of more intensive rural development and, as the Respondent contends, there is no GMA requirement to limit the Rural-2.5 designation solely to LAMIRDs. The County has a designated process in its Comprehensive Plan to monitor and evaluate requests for more intensive use and has planned for potential LAMIRDs and sub-area plans in the future.

As for the Petitioner's argument that the County must follow the requirement in RCW 36.70A.070(5)(a), where a county shall develop a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of the GMA, the Eastern Board addressed this issue in *Concerned Friends of Ferry County, et al. v. Ferry County,* EWGMHB Case No. 01-1-0019, cited above, as did the Central Board in *Screen, et al. v. Kitsap County*:

> The Board reads [RCW 36.70A.070(5)(a)] as requiring a written record in those instances where a county has considered local circumstances and has established a pattern of densities and uses that would not be considered rural absent the local circumstances (citations omitted). [Allowing 1 dwelling unit per 20 acres is clearly a rural land use designation. Here, the County did not rely on local circumstances to justify an "atypical" rural density or use.] [*Screen II, 9312,* FDO, at 10.] *Screen, et al. v. Kitsap County*, CPSGMHB Case

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No. 99-3-0006c, Notice of Hearing, Order of Consolidation of Portion of *Screen I* with *Screen II* and Coordination with Portion of *Alpine* (Jul. 22, 1999).

The County has not shown in the record how the Rural-2.5 category harmonizes Planning Goals Nos. 1 and 2. The meeting minutes of the Planning Commission from August 2000 to May 2001 show a discussion on the Rural-2.5 designation at every meeting. In those discussions, the Planning Commission members are repeatedly told by staff that a density of one unit per 2.5 acres is considered urban and, if appealed, would not survive a challenge to the Growth Management Hearings Board. There is obvious concern by the Planning Commission members as to whether Rural-2.5 is appropriate, but in the end, they chose to include Rural-2.5 in their recommendation to the County Commissioners. There was no reference to any studies or pertinent local information in the record to justify the smaller rural lot size.

The Board understands the County has put constraints on where the Rural-2.5 designation has been allowed, such as locations within a fire district and within five miles of a fire station, along highways, state routes or other arterials and away from critical areas, but these constraints are ineffective in reducing sprawl and protecting the natural resource base so important to Pend Oreille County. The County has approximately 4,000 unimproved lots in the rural areas of the County totaling almost 11,000 acres. The density would average out to one dwelling unit per 2.75 acres. And, further calculations show that the existing lots in the rural area have over twice the capacity needed to accommodate the County's 2025 growth target.

One density unit per 2.5 acres is classic urban sprawl that is typically seen along highways and areas without zoning control. These lot sizes must accommodate their own well, septic system, stormwater run-off and impervious surfaces, which may affect water quantity and quality in adjacent lots. They do not protect the rural lands as required by the GMA.

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Conclusion:

The Petitioner has carried their burden of proof on Issue No. 1 and has shown that the actions of the County are clearly erroneous.

V. FINDINGS OF FACT

1. Pend Oreille County is a county located east of the crest of the Cascade Mountains and has chosen to plan under Chapter 36.70A.
2. Petitioners have participated in the adoption of Resolution No. 2005-33 in writing and through testimony.
3. Pend Oreille County enacted the Pend Oreille County Comprehensive Plan under Resolution No. 2005-33 on October 17, 2005.
4. Petitioners filed their petition for review on December 14, 2005.
5. Petitioners raised one legal issue in their Petition for Review to the Board.
6. Pend Oreille County adopted rural land designations, including a Rural-2.5 designation, which allows one density unit per 2.5 acres.
7. The Board finds that 2.5-acre lots are urban densities outside LAMIRDs.
8. Rural character, resource lands and water quantity are not protected by 2.5 acre lots in the rural area and do not encourage urban growth in urban areas or reduce sprawl.
9. The Board does not find any documentation in the record that justifies the Rural-2.5 designation.

VI. CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties to this action.
2. This Board has jurisdiction over the subject matter of this action.
3. Petitioners have standing to raise the issues listed in the Prehearing Order.
4. The Petition for Review in this case was timely filed.
5. The Rural-2.5 designation is urban density and is prohibited.

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6. Pend Oreille County failed to justify in writing its decision to consider local circumstances to adopt urban-like development in the rural areas.

7. Pend Oreille County failed to encourage urban-like density in urban areas where adequate facilities and services exist or can be provided in an efficient manner.

8. Pend Oreille County failed to reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.

VIII. ORDER

1. The Board finds Pend Oreille County out of compliance on Issue No. 1.

2. The Board finds that the Petitioner has carried their burden of proof and shown that the actions of the County are clearly erroneous in light of its failure to comply with RCW 36.70A.020(1), RCW 36.70A.020(2) and RCW 36.70A.070(5).

3. Pend Oreille County must take the appropriate legislative action to bring itself into compliance with this Order by **April 30, 2007, 180** days from the date issued. The following schedule for compliance, briefing and hearing shall apply:

- The County shall file with the Board by **May 7, 2007, an original and four copies** of a Statement of Actions Taken to Comply (SATC) with the GMA, as interpreted and set forth in this Order. The SATC shall attach copies of legislation enacted in order to comply. The County shall simultaneously serve a copy of the SATC, with attachments, on the parties. By this same date, the County shall file a "Remanded Index," listing the procedures and materials considered in taking the remand action.

- By no later than **May 21, 2007,** Petitioners shall file with the Board an **original and four copies** of Comments and legal arguments on the County's SATC. Petitioners shall simultaneously serve a copy of their Comments and legal arguments on the parties.

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- By no later than **June 4, 2007,** the County shall file with the Board an **original and four copies** of the County's Response to Comments and legal arguments. The County shall simultaneously serve a copy of such on the parties.

- By no later than **June 11, 2007,** Petitioners shall file with the Board an **original and four copies** of their Reply to Comments and legal arguments. Petitioners shall serve a copy of their brief on the parties.

- Pursuant to RCW 36.70A.330(1) the Board hereby schedules a telephonic Compliance Hearing for **June 18, 2007, at 10:00 a.m.** The parties will call **360-357-2903 followed by 18108 and the # sign.** Ports are reserved for Ms. Doolittle, Mr. Metzger, and Mr. Kenyon. If additional ports are needed please contact the Board to make arrangements.

If the County takes legislative compliance actions prior to the date set forth in this Order, it may file a motion with the Board requesting an adjustment to this compliance schedule.

Pursuant to RCW 36.70A.300 this is a final order of the Board.

Reconsideration:

Pursuant to WAC 242-02-832, you have ten (10) days from the mailing of this Order to file a petition for reconsideration. Petitions for reconsideration shall follow the format set out in WAC 242-02-832. The original and four (4) copies of the petition for reconsideration, together with any argument in support thereof, should be filed by mailing, faxing or delivering the document directly to the Board, with a copy to all other parties of record and their representatives. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite for filing a petition for judicial review.

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Judicial Review:

Any party aggrieved by a final decision of the Board may appeal the decision to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil.

Enforcement:

The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail. Service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order.

Service:

This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19)

SO ORDERED this 1st day of November 2006.

EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

_____

Judy Wall, Board Member

_____

John Roskelley, Board Member

_____

Dennis Dellwo, Board Member

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